

NOTICE OF PROPOSED MODIFICATIONS TO  
PROPOSED REGULATIONS

DATE: November 20, 1998

TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: Modification of Proposed Regulations on Personal Services Contracts

NOTICE IS HEREBY GIVEN

Pursuant to the Administrative Procedure Act, a notice dated July 31, 1998 was published in the California Regulatory Notice Register 98, No. 29-Z, and distributed to state agencies and employee groups, that provided that the State Personnel Board (Board), subject to consideration of the input received, would adopt Sections 547.60, 547.61, 547.62, 547.63, 547.64, 547.65, and 547.66 in Title 2, Article 29 of the California Code of Regulations at its regularly scheduled meeting on September 1, 1998.

A public hearing was held at the September 1, 1998 Board meeting to receive oral and written input on the proposed regulatory action.

In response to the oral and written input it received, the Board has modified the proposed regulations. The modifications that the Board has made to the proposed regulations are indicated in the text of the modified proposed regulations attached hereto. Additions to the proposed regulations are indicated in *Italics*; deletions are indicated by ~~strikethroughs~~.

**PLEASE TAKE NOTICE THAT**, subject to the consideration of the input received on this modified proposed regulatory action, the Board will adopt Sections 547.60, 547.61, 547.62, 547.63, 547.64, 547.65, 547.66, 547.67 and 547.68 in Title 2, Article 29 of the California Code of Regulations at its regularly scheduled meeting on January 5, 1999, at 1:00 p.m. at the State Personnel Board, Room 150, 801 Capitol Mall, Sacramento, CA 95814.

PUBLIC HEARING

A public hearing will be held to receive oral and written input on the modified proposed regulatory action at the January 5, 1999, meeting of the Board from 1:00 p.m. to 2:00 p.m. at the State Personnel Board, Room 150, 801 Capitol Mall, Sacramento, CA 95814.

AUTHORITY AND REFERENCE

The Board proposes to adopt these regulations under the authority granted by Government Code Section 18701 and Public Contract Code Section 10337(a) in order to implement, interpret or make specific Government Code Sections 18654.5, 18670, 19130(a) and (b), 19131 and 19132; and Public Contract Code Sections 10337(a), (b) and (c).

INFORMATIVE DIGEST

Government Code Section 18701 authorizes the Board to prescribe, amend and repeal regulations for the administration of the Civil Service Act.

The State Personnel Board's role in personal services contracts is to insure that the merit and civil service provisions of the State's Constitution are enforced. Government Code Section 19130(a) and (b) provide the standards pursuant to which state agencies may enter into personal services contracts.

California Code of Regulations Section 279.1 defines "personal services contract." Sections 279.2, 279.3 and 279.4 interpret Government Code Section 19130(a). (Once the proposed sections are adopted, these existing sections will be moved to the proposed Article 29 and renumbered accordingly.)

Public Contract Code Section 10337(a) permits the Board to establish standards and controls for the Department of General Service's (DGS) approval of personal services contracts to assure that DGS's approval is consistent with the merit employment principles and the requirements contained in Article VII of the California Constitution.

Government Code Section 19131 and Public Contract Code Section 10337(b) set forth the procedures the Board follows when it reviews, at the request of an employee organization, a personal services contract proposed or entered into by a state agency under Government Code Section 19130(a).

Government Code Section 19132 and Public Contract Code Section 10337(c) set forth the procedures the Board follows when it reviews, at the request of an employee organization, a personal services contract proposed or entered into by a state agency pursuant to Government Code Section 19130(b).

Government Code Section 18654.5 provides that the Board's Executive Officer shall administer the civil service statutes under the Board's rules, subject to the right of appeal to the Board. Government Code Section 18670(a) provides that the Board may hold hearings and make investigations concerning all matters relating to the enforcement and effect of the Civil Service Act and rules prescribed by the Board thereunder.

#### STATEMENT OF REASONS FOR THE MODIFICATIONS

To date, the Board has not adopted regulations to implement Government Code Sections 19131 and 19132 or Public Contract Code Section 10337 as they relate to contract disputes. Since these statutory provisions do not address all procedural issues that may arise during the course of contract reviews, regulations are necessary to provide comprehensive procedures.

The proposed regulations Sections 547.60, 547.61, 547.62, 547.63, 547.64, 547.65, 547.66, 547.67 and 547.68 clarify for all interested persons the procedures that will be followed when the Board reviews disputed contracts for compliance with Government Code Section 19130.

Under the modified proposed regulations, pursuant to Public Contract Code Section 10337(a), the Board establishes a standard and control for DGS that requires DGS to obtain a written justification from a state agency before DGS approves an agency contract let under Government Code Section 19130(b). This modification is intended to insure that a state agency explains in writing its justification for executing a contract before it enters into that contract.

The modified proposed regulations provide that an employee organization may file with the

Board and serve upon a state agency a request that the Board review a contract proposed or executed by that state agency under Government Code Section 19130(b). Since an employee organization will have access to the justification for the disputed contract the state agency has filed with DGS, the modified proposed regulations require that the employee organization include information and evidence with its request for review that it believes demonstrates that the disputed contract does not meet the conditions set forth in Government Code Section 19130(b). The employee organization may also include with its request for review a request that the matter be referred to an evidentiary hearing.

The proposed regulations have been modified to require that a state agency shall serve a copy of the request for review upon the contractor(s) to the disputed contract within 7 days after receiving a copy of that request for review from the employee organization. The Board has made this change to insure that contractors will be given notice of the contract review request at an early stage in the review process so that they may decide whether to seek to intervene as parties.

Within 15 days after receiving the request for review, the state agency must file with the Board and serve upon the employee organization a copy of the contract and the agency's written response, together with information and evidence that it believes demonstrate that the contract complies with Government Code Section 19130(b). Within 5 days after the state agency serves its response upon it, the employee organization may file with the Board and serve upon the state agency a reply to that response.

For a contract let under either Government Code Section 19130(a) or (b), the modified proposed regulations provide that, within 30 days from the date the Board receives the contract, the Board's Executive Officer will either: (1) determine that the employee organization has shown good cause for an evidentiary hearing and refer the matter to an administrative law judge or other authorized representative of the Board; or (2) determine that good cause has not been shown for an evidentiary hearing, decide whether the contract complies with Government Code Section 19130(a) or (b), and issue a written decision approving or disapproving the contract. In the modified proposed regulations, the Board has changed the definition of good cause to require that: (1) the employee organization must show that there are disputed issues of material fact regarding a contract and (2) such issues can only be resolved by an evidentiary hearing. This change has been made to clarify that the Executive Officer must refer a matter to an evidentiary hearing only if he or she cannot resolve disputed issues of material fact him or herself. The proposed regulations have also been modified to allow the Executive Officer to refer a disputed contract to either an administrative law judge or another authorized Board representative. This modification will provide the Executive Officer with greater flexibility to insure that the chosen trier of fact will be impartial.

If the disputed contract is referred for an evidentiary hearing, the administrative law judge or other authorized Board representative who conducts that evidentiary hearing will write a proposed decision that will be reviewed by the Board.

If the Executive Officer issues a written decision either approving or disapproving the contract, that decision may be appealed to the full Board within 30 days after issuance. The modified proposed regulations allow the Executive Officer to grant continuances of oral arguments before the Board and extensions of time for filing briefs with the Board. The modified proposed regulations also set forth how requests for review, agency responses and other papers may be

filed with the Board and must be served upon opposing parties. The modified proposed regulations allow the Executive Officer, Board, administrative law judge or authorized representative to whom a matter is referred to permit contractors to intervene as parties in the review process under certain circumstances.

#### FISCAL IMPACT

This modified proposed regulatory action imposes: (1) no additional cost to any state agency; (2) no cost on any local agency or school district that is required to be reimbursed under Part 7 (commencing with Sections 17500) of Division 4 of the Government Code; (3) no other non-discretionary costs or savings on local agencies; and, (4) no cost or savings in federal funding to the State.

#### COSTS TO LOCAL AGENCIES AND SCHOOL DISTRICTS AND EFFECT ON HOUSING COSTS

This modified proposed regulatory action does not impose a mandate on local agencies or school districts. This modified proposed regulatory action does not effect housing costs.

#### EFFECT ON BUSINESS

This modified proposed regulatory action will not have an adverse economic impact on business, including the ability of California businesses to compete with business in other states.

#### EFFECT ON SMALL BUSINESS

The modified proposed regulatory action will not effect small business because the process has been established for several years and the proposed regulations essentially formalize the process.

#### BUSINESS ASSESSMENT

The modified proposed regulatory action will neither create nor eliminate jobs or businesses in the State of California, nor result in the elimination of existing businesses, nor create or expand business in the State of California.

#### POTENTIAL COST IMPACT ON DIRECTLY AFFECTED PRIVATE PERSONS OR BUSINESSES

This modified proposed regulatory action will have no new cost impact over and above cost that is already experienced by individuals or businesses doing business with the State.

#### ALTERNATIVES CONSIDERED

The State Personnel Board must determine that no alternative considered by the Board would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

#### AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board has prepared an Initial Statement of Reasons, the text of the proposed regulations and the text of the modified proposed regulations. These documents, all information upon which the proposed regulations are based and all written comments the Board receives are available to the public upon request. The rulemaking file will be available for public inspection at Room 555 of the State Personnel Board, 801 Capitol Mall, Sacramento, CA.

#### AVAILABILITY OF TEXT WITH ADDITIONAL MODIFICATIONS

Following the written comment period and the public hearing the Board may take the modified proposed regulatory action substantially as described in this notice. If additional modifications are made which are sufficiently related to the modified proposed text, the text with additional modifications clearly indicated will be made available to the public for at least 15 days prior to the date on which the Board adopts the resulting regulatory action. Requests for copies of any additional modifications should be addressed to the contact person identified in this notice. Written comments on the text with additional modifications will be accepted for 15 days after the date on which they are first made available to the public.

#### DEADLINE FOR WRITTEN COMMENTS

Interested parties are invited to submit written comments no later than January 4, 1999, to

Karen J. Brandt, State Personnel Board, Legal Department, P.O. Box 944201, Sacramento CA 94244-2010.

#### CONTACT PERSON

Questions regarding this regulatory action should be directed to Karen J. Brandt at (916) 653-1403, CALNET 453-1403 or TDD (916) 653-1498.

LAURA M. AGUILERA, Chief

Personnel Resources and Innovations Division

Attachment: Text of Modified Proposed Regulations

### **State Personnel Board**

### ***Modified Proposed Regulations Governing Board***

### **Review of Personal Services Contracts**

Additions to the proposed regulations are indicated in Italics; deletions are indicated by strikethroughs.

#### **Title 2, Article 29. Personal Services Contracts**

A. Procedures for Reviewing Personal Services Contracts proposed or entered into pursuant to Government Code § 19130(b).

§ 547.60. Standard and control for approval of contracts. When a state agency

*requests approval from the Department of General Services for a contract let under Government Code § 19130(b), the agency shall include with its contract transmittal a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code § 19130(b).*

*Note: Authority Cited: Section 10337(a), Public Contract Code; Section 18701, Government Code. Reference: Section 19130, Government Code.*

*§ 547.61      Employee Organization's Request for Review. Any employee organization that represents state employees may request that the Board review a contract proposed or executed by a state agency pursuant to Government Code § 19130(b) by filing with the Board and serving upon the state agency a written request for review. The employee organization's request for review shall identify the contract to be reviewed and include the following:*

- a.      specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code § 19130(b); and*
- b.      documentary evidence and/or declarations in support of the employee organization's position.*

*The employee organization shall file a certificate of service with the Board that states when and how it served a copy of its request for review upon the state agency.*

*Note: Authority Cited: Section 18701, Government Code. Reference: Section 19130 and 19132, Government Code; Section 10337, Public Contract Code.)*

*§ 547.602.      State Agency's Justification Response. ~~The Board shall transmit to a state agency that proposes to execute or has executed a personal services contract under Government Code § 19130(b) a copy of any request the Board may receive from an employee organization which that represents state employees that asks the Board to review the that state agency's proposed or executed contract for compliance with Government Code § 19130(b).~~ Within 7 days after the state agency receives a copy of the employee organization's request for review, the state agency shall serve a copy of that request upon the contractor(s) to the disputed contract. Within 15 days after the Board transmits to the state agency receives a copy of the employee organization's request for review ~~the employee organization's review request~~, the state agency shall file with the Board and serve upon the employee organization:*

- a.      a copy of the proposed or executed contract; and*
- b.      the state agency's written ~~justification~~ response to the employee organization's request for review which shall include:*
  - 1. specific and detailed *factual* information that demonstrates how the contract meets one or more of the conditions specified in ~~subdivision (b)~~ of Government Code § 19130(b); and*

2. *documentary* evidence and/or declarations in support of the state agency's position.

Note: Authority Cited: Section 18701, Government Code. Reference: Sections 19130, 19131, and 19132, and 19133, Government Code; *Section 10337, Public Contract Code*.

§ 547.643. Employee Organization's Opposition Reply.

a. ~~Employee Organization's Position.~~ Within 15 days after it receives from the state agency a copy of the contract and the state agency's *justification response*, an employee organization ~~shall~~ *may* file with the Board and serve upon the state agency its a written ~~opposition reply~~ to the state agency's *justification response*. ~~which shall include the following:~~

~~—— (1) —— specific and detailed information that demonstrates how the contract fails to meet the conditions specified in subdivision (b) of Government Code § 19130(b); and~~

~~—— (2). —— evidence and/or declarations that support the employee organization's position.~~

Note: Authority Cited: Section 18701, Government Code. Reference: Sections 19130, 19131, and 19132, and 19133, Government Code; *Section 10337, Public Contract Code*

- B. Supplemental Procedures for Reviewing Personal Services Contracts under either Government Code § 19130(a) or § 19130(b).

§ 547.634. Executive Officer Decision. Within 30 days after receiving from the state agency a copy of the proposed or executed contract and the state agency's *justification*, the Executive Officer shall do one of the following:

a. If the employee organization has shown that good cause exists for referring the disputed contract for a hearing for the purpose of taking evidence and hearing arguments, the Executive Officer, *in accordance with § 547.65*, shall refer the matter to an administrative law judge *or other authorized representative of the Board* to conduct an evidentiary hearing and submit a proposed decision. ~~in accordance with § 547.62c.~~

b. If the employee organization has not shown that good cause exists for referring the disputed contract for a hearing for the purpose of taking evidence and hearing arguments, the Executive Officer shall issue a written decision either approving or disapproving the contract and explaining the reasons for the decision.

Note: Authority Cited: Section 18701, Government Code. Reference: Sections 19130, 19131, and 19132, and 19133, Government Code; *Section 10337, Public Contract Code*.

§ 547.625. Evidentiary Hearing.

a. Request for a Board Hearing. The employee organization may request that, in lieu of the Executive Officer making a decision approving or disapproving the ~~proposed~~ *disputed* contract, the ~~proposed~~ *disputed* contract to be referred to the Board for a hearing. To make such a request, the employee organization shall include with ~~either its request for review or its opposition~~, written arguments, evidence and/or declarations ~~which~~ *that* show that good cause exists for scheduling a hearing for the purpose of receiving evidence and hearing arguments concerning the propriety of the disputed contract.

b. Good Cause. In order to show that good cause exists for referring the disputed contract for a hearing for the purpose of taking evidence and hearing arguments, the employee organization must show that there are disputed issues of material fact regarding the contract that must be resolved *before a determination is made as to whether the disputed contract meets the criteria of Government Code § 19130 and that an evidentiary hearing is necessary in order to determine whether the contract meets the criteria of Government Code § 19130 resolve these disputed issues of material fact.*

c. Executive Officer Determination. The determination as to whether the employee organization has shown that good cause exists for referring the disputed contract for *an evidentiary* hearing shall be made by the Executive Officer. If the Executive Officer determines that good cause does not exist for referring the disputed contract for *an evidentiary* hearing, the contract review process shall proceed as an investigation and the Executive Officer shall issue a decision approving or disapproving the contract.

d. Conduct of an Evidentiary Hearing ~~before an Administrative Law Judge.~~ Upon finding that the employee organization has shown good cause for referring the disputed contract for *an evidentiary* hearing ~~for the purpose of taking evidence and hearing arguments~~, the Executive Officer shall refer the contract to an administrative law judge *or other authorized representative of the Board* to conduct an evidentiary hearing and submit a proposed decision to the Board in accordance with the procedures set forth in ~~Government Code §§ 18761.1 and 19582~~ *Government Code, Title 2, Division 5, Part 2, Chapter 2, Article 2 (commencing with § 18670) and Chapter 7, Article 1 (commencing with § 19570), and the Board regulations promulgated thereunder.*

Note: Authority Cited: Section 18701, Government Code. Reference: Sections 19130, 19131 and 19132, ~~and 19133~~, Government Code; *Section 10337, Public Contract Code.*

C. Procedures for Appealing an Executive Officer's Decision Approving or Disapproving a Contract under Government Code § 19130(a) or § 19130(b) to the Board.

§ 547.646. Appeal from an Executive Officer's Decision. ~~Either the state agency or~~



~~the employee organization~~ Any party may appeal the Executive Officer's decision to the Board by ~~submitting~~ *filing* a written request ~~to~~ *with* the Board within 30 days after issuance of the Executive Officer's decision. Upon receipt of a timely appeal, the Executive Officer shall schedule the matter for briefing and oral arguments before the Board. *The Board will decide the appeal upon the factual information, documentary evidence and declarations submitted to the Executive Officer before he or she issued his or her decision. Upon the objection of a party, the Board will not accept additional factual information, documentary evidence or declarations that were not previously filed with the Executive Officer if the Board finds that the submission of this additional factual information, documentary evidence or declarations would be unduly prejudicial to the objecting party.*

Note: Authority Cited: Section 18701, Government Code. Reference: *Sections 18654.5, 18670, 19130, 19131 and 19132, and 19133, Government Code; Section 10337, Public Contract Code.*

D. Procedures that apply to all contract review proceedings.

§ 547.657. a. Continuances and Extensions. The Executive Officer may grant continuances of ~~hearings~~ *oral arguments* before the Board and extensions of time for ~~the issuance of a decision, the scheduling of a hearing or the filing of a justification, opposition,~~ *briefs or other documents for those oral arguments* upon the consent of all parties or for good cause shown.

b. Filing. *Requests for review, agency responses, briefs, and other documents may be filed with the Board by facsimile sent to the Board's Chief Counsel's Office. A document will be considered filed with the Board when the Board actually receives it.*

c. Service. *Requests for review, agency responses, briefs and other documents shall be served upon all other parties by personal delivery, facsimile, telecopy, express mail or other means designed to ensure that they are received by the other parties on the same day they are filed with the Board.*

Note: Authority Cited: Section 18701, Government Code. Reference: *Sections 18670, 19130, 19131 and 19132, and 19133, Government Code; Section 10337, Public Contract Code.*

§547.668. Intervention.

a. At any time after an employee organization requests that the Board review a contract for compliance with Government Code § 19130(a) or § 19130(b), a contractor ~~with whom the state agency proposes to contract or has contracted to the disputed contract~~ may move to intervene as a party in the contract review process. Either the Executive Officer, administrative law judge *or authorized representative* who conducts an evidentiary hearing, or Board may grant a motion for intervention if all the following conditions are satisfied:

(1) A written motion is filed with the Board, with copies served upon the state

agency and the employee organization.

(2) The motion is made as early as practicable.

(3) The motion states facts demonstrating that the applicant's

~~legal rights, duties, privileges, or immunities shall be substantially~~ *has an interest in the disputed contract that may be* affected by a decision upon ~~the disputed~~ *that* contract or that the applicant qualifies as an intervenor under a statute or regulation.

(4) The Executive Officer, administrative law judge, *authorized representative* or Board determines that the interests of justice and the orderly and prompt conduct of the contract review process shall not be impaired by allowing the intervention.

b. If an applicant qualifies for intervention, the Executive Officer, administrative law judge, *authorized representative* or Board may impose conditions on the intervenor's participation in the contract review process, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the intervenor's participation in any proceedings so as to promote the orderly and prompt conduct of the Executive Officer's investigation, the administrative law judge's *or authorized representative's* evidentiary hearing, or the oral arguments before the Board.

(3) Requiring two or more intervenors to combine their presentations of evidence and arguments, and other participation during the Executive Officer's investigation, the administrative law judge's *or authorized representative's* evidentiary hearing, or oral arguments before the Board.

(4) Limiting or excluding the intervenor's participation in settlement negotiations.

c. As early as practicable in advance of the Executive Officer's investigation, the administrative law judge's *or authorized representative's* evidentiary hearing, or oral arguments before the Board, the Executive Officer, administrative law judge, *authorized representative* or Board shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order. The Executive Officer, administrative law judge, *authorized representative* or Board may modify the order at any time, stating the reasons for the modification. The Executive Officer, administrative law judge, *authorized representative* or Board shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties.

d. Whether the interests of justice and the orderly and prompt conduct of the contract review process shall be impaired by allowing intervention is a determination to be made in the sole discretion, and based on the knowledge and judgment at that time,

of the Executive Officer, administrative law judge, *authorized representative* or Board. The determination is not subject to administrative or judicial review.

e. If a motion for intervention is denied, the Executive Officer, administrative law judge, *authorized representative* or Board may permit a contractor to submit written arguments and participate in the Executive Officer's investigation, the evidentiary hearing before the administrative law judge or *authorized representative*, or oral arguments before the Board as the Executive Officer, administrative law judge, *authorized representative* or Board may deem appropriate under the circumstances.

Note: Authority Cited: Section 18701, Government Code. Reference: Sections 19130, 19131 ~~and~~ 19132, ~~and~~ 19133, Government Code; *Section 10337, Public Contract Code*.